bank might be ruined, for as it pays checks in the order of their presentation, the account might have been paid while a prior check was outstanding, of which they had no knowledge, and for the payment of which they were still bound. This view is so absurd that it will not be advanced. Is the contract made by a presentment of the holder for payment? Manifestly not, for then the bank is simply called upon to *fulfil* a duty or obligation which is assumed to have been *previously* incurred. Presentment for payment *ex vi termini* involves the notion of an already existing obligation to pay a debt to the presentor, except where payment is voluntary. Does the contract arise when the bank refuses payment? Then it is believed to be the only case in the law when that which was not a contract before becomes such by a refusal to contract. Clearly then the holder has no remedy against the bank. The authorities and dicta which hold that an acceptance is necessary before the holder can bring his action are, among others, National Bank *vs.* Eliot Bank, 5 Am. Law Register 711, Superior Court, Suffolk Co., Mass.; Ballard *vs.* Randall, 1 Gray 606; Bellamy *vs.* Marjoribanks, 7 Exch. R. 404, per PARKE, B.; Chapman *vs.* White, 2 Selden 412. The text writers on bills and notes uniformly express themselves in the same manner. Without doubt, the bank is liable to the *depositor* for all the damages sustained by its refusal to pay a check which he had a right to draw. Marzetti *vs.* Williams, 1 B. & Ad. 415. No claim can be made by the holder of an uncertified check that it can operate in his favor as an assignment to him of so much money as the check represents. This proposition has been often decided. See the leading case of Dykers *vs.* Leather Manufacturers' Bank, 11 Paige 616.

IV. The proposition in the principal case, that the identity of the name of the drawer of the check and of the president of the bank is sufficient to put the holder on his guard, is sustained by Hatcher *vs.* Rochelcau, 18 N. Y. 86; Jackson *vs.* Goes, 13 Johns. 518, per SPENCER, J.; Jackson *vs.* King, 5 Cow. 237; 9 Id. 140.

RECENT ENGLISH DECISIONS.

Exchequer of Pleas, Nov. 7, 1862.

ARBON AND ANOTHER *vs.* FUSSELL.[1]

An agreement for the hire by defendant from plaintiffs of a pair of carriage-horses for twelve months, the defendant to give three months' notice previous to the expiration of the year of her intention to give up the horses, was prepared in duplicate, and one part signed by plaintiffs was sent by them to defendant by her servant, and the other part signed by defendant was retained by plaintiffs. Defendant having given up the horses without notice, plaintiffs brought an action against her on the agreement. Having lost their part, plaintiffs gave

[1] 7 Law Times, N. S. 283.

notice to defendant to produce her part of the agreement at the trial, which was not complied with, nor was any evidence given as to where it was.

It being proved that it was not stamped when sent by plaintiffs to defendant, WILDE, B., refused to admit secondary evidence of its contents; whereupon plaintiffs proceeded to give evidence of a custom in the trade that it was usual for the hirer, under such circumstances, to give a three months' notice. The jury, however, negatived the existence of such a custom, and found a verdict for defendant:

Held, that WILDE, B., was right in rejecting secondary evidence of the contents of the document; and that, as it was proved to have been unstamped at the time it was sent by plaintiffs to defendant, the proper presumption was that it remained still unstamped; and the fact of the defendant's not producing it at the trial after notice so to do, afforded, under the circumstances, no ground for the presumption that it had been subsequently stamped:

The evidence as to the custom of the trade was beside the point which the jury had to determine, and when it was found that the document bore no stamp, the plaintiffs should have been nonsuited.

Per CHANNELL, B.—A written contract governs the rights of the parties to it, and cannot be varied, added to, or qualified; with one exception, that in some cases the custom of a trade may be annexed as incident to the contract; that is, not where the custom contradicts the contract, but where it is consistent with it.

[The pleadings in the case are omitted, as not necessary to its comprehension.]

At the trial, before WILDE, B., and a special jury, at the Middlesex sittings after Trinity Term, the following facts appeared:—The plaintiffs were jobmasters, near Portman-square, and the defendant a lady of independent fortune, residing occasionally in London, and at other times in different parts of the country, had hired horses of the plaintiffs on the terms of an agreement, which defendant alleged had been come to six months after the hiring, under the following circumstances: On 8th January, 1857, defendant sent her coachman to plaintiffs to know the rate at which horses were supplied, and in reply plaintiffs gave the coachman their terms in a note, which defendant called a "proposal," but which was as follows:—"Mem. of agreement made 8th January, 1857, between Mrs. Fussell, of, &c., on the one part, and James Arbon & Son, of, &c., on the other part. Mrs. F. agrees to take, and J. A. & Son agree to let, a pair of carriage horses for three months, eighty-four days, for the sum of twenty guineas per month;

but should Mrs. F. desire to keep the said horses for six months of twenty-eight days, then at the rate of eighteen guineas per month, or if for twelve months of 365 days, the rate to be 150*l.* per year. J. A. & Son to shoe and forage the said horses." It was not signed by either party. Defendant arranged to take the horses, but signed no agreement as to the time for which she would take them, nor was any time then named. After six months the coachman called again on plaintiffs, to say Mrs. F. would take them for twelve months, whereupon plaintiffs prepared an agreement in duplicate, and sent it by the coachman to the defendant for approval. Defendant returned the agreement signed by her, and plaintiffs forwarded to her, by the coachman, the duplicate signed by them. It was dated 8th January, 1857, and was to the following effect:—"Mrs. F. agrees to take, and J. A. & Son agree to let, a pair of carriage horses for one year for the sum of 150*l.*, with six guineas for the use of utensils. A. & Son to forage and shoe the said horses when in London, and to allow 28*s.* per week for the keep, &c., of the said horses when out of London. A. & Son further agree, should either or both the said horses fall ill or lame, to provide others in their place on their being returned home. Mrs. F. also further agrees to give three months' notice previous to the expiration of the year, or of any future year, of her intention to give up the horses."

Under this agreement the defendant continued to use the horses until December, 1859, when she gave them up without notice. In November, 1859, defendant's coachman was driving her carriage with plaintiffs' horses, when one of them was injured and died in consequence of a collision with a van, and which, as plaintiffs were informed by defendant's coachman and butler, arose from the careless driving of the vanman. Relying on the statements so made to them, plaintiffs brought an action against the owner of the van to recover damages, but failed in consequence of its appearing on the trial that the accident arose from the careless driving of defendant's coachman.

Plaintiffs having lost their duplicate of the agreement signed by defendant, WILDE, B., refused to admit secondary evidence of

its contents to be given, it being proved not to have been stamped. Plaintiffs' counsel then proposed to give secondary evidence of the duplicate signed by plaintiffs and sent to defendant, notice to produce it having been given to defendant, and not having been complied with, and no evidence having been given as to where it was. But, it being elicited, on cross-examination by defendant's counsel, that their part also, when it was given by plaintiffs to the coachman, was not stamped, the learned Baron refused to receive secondary evidence of it.

Under these circumstances, plaintiffs were thrown back on the original agreement, or "proposal," which they put in, plaintiffs paying the penalty for stamping it in Court. As this document contained nothing about notice, they gave evidence of a custom in the trade that three months' notice of intention to terminate a yearly hiring was usual; and also of a custom that the hirer was liable for an injury to the horses occurring through the negligence of the hirer or his servants.

The jury found a verdict for defendant, and against the plaintiffs, on all the questions left to them by the learned judge, viz., that there was no general custom in the trade acted on by those who let and those who hire with regard to the liability of the hirer; that defendant's coachman was not negligent; that defendant used the horses in a proper manner; and that there was no necessity for a three months' notice; and thereupon WILDE, B., stayed execution, in order to give plaintiffs an opportunity of moving.

Garth (with whom was *Huddleston*, Q. C.) now moved for a new trial on the ground of the improper rejection of evidence, and also that the verdict was against evidence. It was contended at the trial, and it was submitted now, that secondary evidence of the duplicate sent by the coachman was admissible. It was traced to defendant's possession, notice to produce it was given, and although it was not stamped when it left plaintiffs' hands, yet it might have been stamped subsequently, and there was no proof to the contrary, or that the document was not at that moment in existence in a stamped state. It was on defendant to prove that it was not. By

not producing it defendant deprived the Court of the opportunity of seeing whether it was stamped or not, and the plaintiffs of having it stamped if it turned out to be unstamped. The horses were returned without a three months' notice, and if that agreement had been put in plaintiffs could have shown by the terms of it the necessity of such a notice. Not having been produced after notice, when it may possibly have been subsequently stamped, it must, as against defendant, who refused to produce it, and into whose possession it had been traced, be presumed to have been stamped. [CHANNELL, B.—It is laid down in Chitty on Stamps that where a party refuses to produce an instrument after notice, the presumption against him is that it was properly stamped *until the contrary appear*, and to that effect are the various cases. Now here the evidence was that when it left plaintiffs' possession the document was unstamped. That presumption therefore in this case would be the other way.] Then as to the other point, that the verdict was against evidence. We gave evidence of a custom in the trade that a three months' notice was usual, which was not contradicted, and though the jury found against plaintiffs on that point, the judge summed up in plaintiffs' favour upon it. So also we gave evidence of a custom for the hirer to be responsible in case of an accident occurring through his negligence, or that of his servant, and submitted that the accident here clearly arose from the carelessness of the coachman. [POLLOCK, C. B.—You don't want a custom for that.] The learned judge rather took that view in summing up, but defendant's counsel urged, that if defendant had appointed a competent coachman an accident would not render her liable. On that also the jury found against plaintiffs.

POLLOCK, C. B.—There will be no rule on this case, the facts of which are very simple. The agreement on which the plaintiffs originally went was drawn up in duplicate, and the evidence was, that neither part was stamped when they were signed by the parties. The plaintiffs had lost their part, and the defendant did not produce her part on notice to do so at the trial. Mr. *Garth* has contended that it should be presumed the defendant's part of the document

was stamped, and it is proposed that we should admit secondary evidence of it. I am at a loss to see what foundation there is under the circumstances for saying that, because defendant did not produce this document at the trial after notice so to do, therefore we are to presume that it was stamped, and to admit secondary evidence of its contents. The question is, what conclusion ought my brother WILDE to have arrived at? Was he bound to have received evidence of it as of a stamped document, or to have come to the conclusion that it was stamped? I think he was not, and that he was right in the conclusion to which he came. It may be that in the case of certain instruments which have been acted on, and which could not have been acted on without a stamp, and where there may have been a penalty for not stamping, and where *omnia rite esse acta* would apply, that there it may be presumed that such instruments were duly stamped. But there is no penalty upon drawing an agreement on unstamped paper, save the inconvenience to the party of being unable to give it in evidence until the stamp duty and an additional sum by way of fine has been paid. It is not like the case of a check or a receipt; and where, moreover, as in this case, the instrument is proved not to have been stamped when last seen, then, as my brother CHANNELL has shown, the presumption is that it is still unstamped. On that point I think the verdict was right, and if it had been for the plaintiffs, the defendant might have moved to set it aside. In fact, no proceedings ought to have taken place after it was found that the document bore no stamp. As to the custom, I think the verdict on that was beside the merits of the case, and plaintiffs should have been nonsuited; but no application has been made to turn the verdict into a nonsuit. The rule must be refused.

BRAMWELL, B.—I think my brother WILDE was perfectly right in his ruling. If he was right in coming to the conclusion that the instrument was not stamped, he was right in keeping it from the jury. I own I think the proper conclusion to come to under the circumstances is, that it was not stamped; for it being proved that it was not stamped when it was sent by the plaintiffs to the defendant, the presumption I think is strongly against its having

been subsequently stamped. As to the other point, I think Mr. *Garth* was better off at the trial than he ought to have been, for his case having broken down on the agreement opened to the jury, he said, "I will give evidence of a custom, and fall back upon another proposal," and that he was allowed to do instead of being nonsuited.

CHANNELL, B.—I am of the same opinion, that there should be no rule. I agree with my Lord Chief Baron and my brother BRAMWELL, that the secondary evidence ought not to have been received of this contract, and that such evidence, when tendered, was rightly rejected. Then the point arises, whether a rule should be granted on the other ground, that the verdict of the jury upon the question that was submitted to them was a verdict against the evidence. That was a verdict by which the jury negatived the custom of giving three months' notice, which the plaintiff set up. I must say that I am very loth at all times to interfere with the finding of a jury, unless I see that it is clearly wrong. In this case the evidence was all on one side. We ought to see that the matter which was submitted to the jury was pertinent to the question which they had to determine. According to my notion, it was quite beside the question. I am of opinion, that where parties enter into a written contract, that written contract governs the rights of the parties. You cannot vary it; you cannot add to it; you cannot qualify it. There is one exception, namely, that in some cases you may annex the custom of the trade as an incident to the contract; that is, not where the custom of the trade contradicts the contract, but where it is a custom that is consistent with it. That is, where the parties contract with reference to the custom, where it is not incorporated in the agreement, but where they have confined the agreement to other matters, you must determine what the agreement really is, and whether you can annex the custom as an incident to such an instrument or not. Therefore, I think the inquiry was immaterial, and that no rule should be granted upon the ground that the verdict was against the evidence. If they were justified in doing as they did, there is an end of the application as to the verdict being against the weight of evidence, and I am not

disposed to grant a new trial unless I see that the inquiry was pertinent to the duty which the jury had to discharge.

Rule refused.

The preceding case, which is condensed from the report in the Law Times, though not perhaps of much intrinsic importance, may be of use for future reference on the questions which must soon arise under the recent Internal Revenue Act. No doubt much practical inconvenience in the trial of cases will be occasioned by the provisions of that act, and it is well to anticipate them by a reference to some of the decisions under similar statutes in England.

It is settled there that where an instrument, actually produced at Nisi Prius, appears not to have been duly stamped, it is not to be treated, for that reason, as non-existent, so as to let in secondary evidence of its contents. Alcock *vs.* Delay, 4 Ell. & Bl. 660. This proposition is sufficiently obvious. It is not, however, so easy to say how far such evidence is admissible, on a general allegation and proof of the existence and loss of an instrument affected by the stamp laws, or that it is in the possession of the other party, who has refused to produce it on call. There can be no doubt that if the general rule on the subject were applied without qualification, there would be a strong temptation on litigants to make an artificial loss of documents supply the lack of proper stamps. It is held, notwithstanding, that the presumption in the case of a lost instrument is, in the first instance, that it was duly stamped, and that it lies on the party objecting to secondary evidence of its contents on the contrary allegation, to prove the fact that it was not stamped; and the same doctrine applies with peculiar force to the case of an instrument in the possession of the party which he fails to produce. Creap *vs.* Andrson, 1 Stark. N. P. 34; Pooley *vs.* Goodwin, 4 Ad. & Ell. 94; Hart *vs.* Hart, 1 Hare 1; Closmadeuc *vs.* Carrel, 18 Comm. B. 44. If, however, it be shown that the instrument was unstamped at the time of its execution, or at some subsequent time, the presumption is rebutted, and it will then lie on the party offering the evidence to show that it was afterwards stamped within the period allowed by law. Crowthers *vs.* Solomons, 6 Comm. B. 758; Closmadeuc *vs.* Carrel, *ut supra.* This, however, need not be by direct proof, but may be rested on any reasonable presumption of fact. Thus in Closmadeuc *vs.* Carrel, *ut supra*, the proper stamp duty on a charter-party had been paid within the fourteen days allowed for the purpose by the 5 & 6 Vict. c. 79, s. 21, and the instrument left at the office of the distributor of stamps at C. for transmission by mail to London to be there stamped; but it could never be found afterwards. There was no direct evidence that it was ever in fact mailed; but the clerk at C. testified that he always sent off the documents left with him, by mail on the same day that he received them. It was held that this sufficiently raised the presumption that the charter-party had been duly stamped before its loss, as the different officials by whom the instrument should have been transmitted and stamped, must be taken to have done their duty.

There is another class of cases on this subject which might, at first sight, seem not altogether consistent with those the result of which has just been stated. Thus in Slatterlie *vs.* Pooley, 6 Mees. & W. 664, which was an action

on a covenant on a composition deed, to indemnify the plaintiff against certain debts set forth in a schedule annexed to the deed, which schedule was unstamped, it was held that evidence of an admission by the defendant that a particular debt in respect to which the suit was brought, was included in the schedule, was admissible. This was, however, put on the ground that the admissions of a party as to the contents of an instrument, when competent at all, are primary and not secondary evidence. There had been previous conflicting decisions on this subject (see 5 Month. Law Mag. 175), which were settled by this case; and it has been since followed in Pritchard *vs.* Bagshaw, 11 Com. Bench 456, and elsewhere. The general doctrine on the subject of admissions, in this respect, will be found stated in 1 Greenl. on Ev. § 96. H. W.

In the Exchequer Chamber.—Appeal from the Court of Exchequer. Feb. 7th, 1862.

HOLMES *vs.* CLARKE.[1]

Where the fence put round certain mill machinery, required by statute to be fenced, had been broken, and the owner having notice of the defect was guilty of negligence in not using reasonable care to have his machinery properly secured, a servant who had entered into his employment when the machinery was fenced, and who continued in the service after knowledge that the fence was gone, in the reasonable expectation, induced by the expressions of the owner and his manager to him, that the defect would be repaired, without negligence on his own part, met with an injury by reason of the machinery being unfenced:—*Held*, that he could maintain an action for the injury against his employer.

An appeal was brought in this case, by the defendant, to review the decision of the Court of Exchequer, discharging a rule obtained by the defendant to enter a verdict for him, or a nonsuit, or for a new trial.

The pleadings and facts are stated at length in the report below,[2] but the following summary of them will explain the case.

The plaintiff was an under overlooker, employed at weekly wages

1 31 L. T. Exch. 356. Decided in the Sittings after Hilary Term, coram Cockburn, C. J., Wightman, J., Willes, J., Crompton, J., Byles, J., and Keating, J.

2 30 Law J. Rep. (N. S.) Exch. 135.